

January 11, 2012

Peter Siegenthaler  
2631 Wawona Drive  
Santa Rosa, CA 95405

Re: Your Request for Advice  
**Our file No. A-11-236**

Dear Mr. Siegenthaler:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).<sup>1</sup> We base this letter on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that we base our advice solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws. We suggest you seek appropriate legal advice to determine if this or any other provisions outside the Act apply.

### **QUESTION**

Does the Act prohibit you from providing private engineering consulting services to the Department of Transportation (“Caltrans”) in connection with contracts administered in any of the 12 Caltrans districts or contracts administered in District 4’s Toll Bridge Program, where, as an employee of Caltrans, you worked on the Toll Bridge Program located in District 4?

### **CONCLUSION**

The one-year ban does not prohibit you from providing such services to Caltrans because it does not appear that the work will be performed for the purpose of influencing administrative or legislative action. However, because this work suggests involvement with an judicial, quasi-judicial, or other proceeding in which you may have previously participated in your state employment, the permanent ban may apply. If your responsibilities included participation in any such proceedings or determinations, you would be permanently prohibited from influencing, for compensation, any such proceedings or determinations.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

You previously worked for Caltrans, retiring in September 2011 after 28 years of service. At the time of your retirement, you were a Professional Engineer in the Toll Bridge Division and worked on the Toll Bridge Program, as Principal Transportation Engineer, on the San Francisco Oakland Bay Bridge (“SFOBB”). This program is located in District 4 of Caltrans. Your duties and responsibilities involved all contractual matters related to construction engineering and contract administration on site, ensuring that the work performed by the State’s contractors met the requirements of the Caltrans contracts. You were responsible for approximately a dozen or more construction contracts or specific EA’s, all exclusively related to the seismic safety project on the SFOBB, and with the Toll Bridge Division.

You are currently employed by a firm in the bay area that provides materials and construction engineering services to local agencies, including, cities, counties and the State. This firm has a contract with the Toll Bridge Program in District 4. At this time, you are not involved with any state contracts. However, it is contemplated that in the future you may become involved on some state work. Your participation on future projects would likely be to provide technical services in materials and construction engineering. You expect that your future work would be limited to technical consultation and providing material and engineering options and solutions on challenges that typically arise on construction projects. You have no intention of getting involved in any policy or legal issues.

You state that when you worked on the Toll Bridge Program in District 4, your position was designated in the agency’s conflict-of-interest code.

## ANALYSIS

Public officials who leave state service are generally subject to two types of post-governmental employment provisions under the Act, colloquially known as the “revolving door” prohibitions.

### **The One-Year Ban**

Section 87406(d)(1) of the Act provides that:

“No designated employee of a state administrative agency . . . for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the

issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.”

“Administrative action” is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, including any proceeding regarding adoption of regulations governed by Government Code, Section 11340 et seq.

Any communications such as telephone calls or meetings with agency staff that are intended to influence administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property, are prohibited under Section 87406. However, communications to administrative agencies that are not for the purpose of influencing administrative or legislative action are not restricted by Section 87406.

Thus, for purposes of the one-year ban under Section 87406, the Act does not prevent you, as a former designated employee of Caltrans, from working on Caltrans projects, provided, however, that in doing so, you do not make any formal or informal appearance, or any oral or written communication, before your former Caltrans if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.<sup>2</sup> You describe the work you will be performing as “technical services in materials and construction engineering.” This work does not appear to be performed for the purpose of influencing administrative or legislative action. Accordingly, the one-year ban does not prohibit you from performing this work on state projects.

### **Permanent Ban**

The Act also contains a permanent prohibition on former state officials’ involvement in certain proceedings in which they participated while working for the state. Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to

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<sup>2</sup> You may appear for purposes other than influencing the actions of Caltrans or other agencies for which you worked during the 12 months before leaving state employment, such as to attend training. (Regulation 18746.2 (b)(2).) In addition, services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.

influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Caltrans is a state administrative agency. (Section 87400(a).) Section 87400(b) defines a “state administrative official” as every member, officer, employee, or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial, or other proceeding in other than a purely clerical, secretarial, or ministerial capacity. As a designated employee of Caltrans, you were considered a state administrative official and you are, therefore, subject to the restrictions of the permanent ban.

These restrictions, however, are limited to judicial, quasi-judicial, or other proceedings in which you participated. Section 87400 provides:

“(c) ‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

“(d) ‘Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.”

Under Section 87400(c) set forth above, a “proceeding” includes any particular matter involving a specific party or parties in a state administrative agency. The permanent ban does not apply to a new proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A new proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual

issues from those considered in previous proceedings. (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.)

Also, under Section 87400(d) and Regulation 18741.1(a)(4), a former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. For purposes of Regulation 18741.1, a proceeding is under a supervisor's "supervisory authority" if the supervisor:

"(A) Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or

"(B) Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or

"(C) Reviews, discusses, or authorizes any action in the proceeding; or

"(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding."

"'Supervisory authority' does not include a supervisor, at a higher level within the agency's chain-of-command than the supervisor identified in subsection (a)(4)(A) above, with responsibility for the general oversight of the administrative actions or functions of a program where the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency's structure (i.e. supervisors under subsection (a)(4)(A) above) unless the higher level supervising official has actual involvement in the proceeding as set forth in subsections (a)(4) (C) or (D) of this regulation."

To determine whether the permanent ban applies, you would need to identify the proceedings in which you participated, as set forth in Section 87400(d) above, while employed by the State. Your duties as a Principal Transportation Engineer of Caltrans on approximately a dozen construction contracts, including those involved in the SFOBB, included independent oversight for all contractual matters related to construction engineering and contract administration. Therefore, it is likely that you will be deemed to have participated in some proceedings because the proceedings were pending under your supervisory authority.

The technical and engineering services you intend to provide on behalf of your employer to Caltrans suggest involvement with a "proceeding" in which you may have previously

participated in your state employment. Under Section 87400 (d), the definition of “judicial, quasi-judicial, or other proceeding” includes a “determination” involving a “specific party or parties” in a state administrative action. If your responsibilities included participation in any such proceedings or determinations, you are permanently prohibited from influencing, for compensation, any such proceedings or determinations in which you participated. We note, however, that if any of your future work involves a new proceeding, (even in cases where the new proceeding is related to or grows out of a prior proceeding in which you participated), the permanent ban does not prohibit you from performing such work.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl